No. 96-1224

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1996

GARY A. MEYERS,

*Petitioner,*

*vs.*

NORFOLK AND WESTERN RAILWAY COMPANY,

*Respondent.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED FOR REVIEW

Did the court of appeals err in deciding that the trial court did not abuse its discretion in refusing to grant petitioner a new trial after specifically finding that petitioner's direct examination testimony made arguably relevant his eligibility for collateral benefits and after further finding that petitioner had secured and was satisfied with a curative instruction to the jury?

## STATEMENT PURSUANT TO RULE 29.6

Norfolk and Western Railway Company is a wholly owned subsidiary of Norfolk Southern Corporation.

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## COUNTER STATEMENT OF THE CASE

Petitioner filed an FELA action against respondent for personal injuries sustained on October 24, 1989 when he fell from a crane bucket upon which he had climbed in violation of respondent's safety rules (R. 1; Tr. Vol. 1 pp. 265-266, 293). The case was tried to a federal jury which, answering a specific interrogatory, unanimously found that respondent was not negligent and accordingly returned a defense verdict (R. 51, 52).

Petitioner thereafter filed a motion for a new trial claiming that although he had demanded a jury, nevertheless he was denied a fair trial because juries are prejudiced against plaintiffs in civil actions (R. 54, Petition at B5-6). Petitioner has since abandoned that contention and now rests his case on the claim that respondent was not entitled to cross examine about petitioner's future eligibility for collateral benefits even though petitioner himself had opened the door on that issue by injecting his financial distress into his case in chief (Petition at p. 4; Tr. Vol. 2 pp. 366-367) and again on cross examination (Petition at p. 5; Tr. Vol. 2 pp. 367-368), points specifically recognized by the trial court (Petition at p. 7; Tr. Vol. 2 p. 370).

The trial court overruled petitioner's motion for a new trial stating:

> On direct examination, Plaintiff's counsel had elicited testimony from Plaintiff's wife concerning her and her husband's concerns over anticipated future financial distress. . . . In the instant case, Plaintiff's wife's testimony on direct arguably opened the door to defense counsel's question. As such, the Court's instruction to disregard the question was sufficient to cure the problem. The

> question to which Plaintiff's counsel objects does not constitute grounds for a new trial.

(R. 57, at pp. 3-4; B-4 of Petition).[1]

Indeed, after the curative instruction was given, petitioner again opened the door by eliciting testimony that he was not the sort of person who would ever go on disability (Tr. Vol. 2 p. 371). (There was no cross examination on this point.)

Moreover, and in any event, the trial court found that petitioner had waived any error because he failed to renew his motion for a mistrial after securing the curative instruction (R. 57 at p. 3; Petition at B-3), a finding which petitioner has never challenged. Indeed, petitioner's failure to renew his motion is tantamount to a finding that he was satisfied with that curative instruction.[2]

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1. Petitioner, in the Questions Presented, describes as "untrue" respondent's cross examination about petitioner's eligibility for disability benefits should he become occupationally disabled after twenty years of service. He further states on page 19 of the Petition that "a railroad employee cannot receive an occupational disability annuity if he is gainfully employed." None of this however is correct because petitioner, who has been employed by respondent since 1977, proved that he would be able to work for the next four to five years, after which his injury would preclude him from his regular employment with respondent (Tr. Vol. 1 pp. 161-162). Thus, he will have put in twenty years of service and will be entitled to his monthly disability annuity. Railroad Retirement Act, 45 U.S.C. § 231a(a)(1)(iv). At that time, respondent proffered that petitioner will receive up to $2,000 per month (Tr. Vol. 2 p. 370).

2. Petitioner's motion was in the alternative for a mistrial or for an instruction that the jury disregard the cross examination in question (Tr. Vol. 2 p. 368, Petition at p. 6). But, petitioner never argued for a mistrial and the court gave the curative instruction in question (Tr. Vol. 2 p. 371; Petition at p. 9).

On appeal from the denial of a new trial, the United States Court of Appeals for the Sixth Circuit affirmed, expressly adopting the reasoning of the trial court (Op. at p. 2; A-1 of Petition).

## REASONS FOR DENYING THE WRIT

The appellate court properly deferred to the trial court's broad discretion in refusing to grant a new trial. In this regard, precedent compelled petitioner to show an abuse of discretion which requires a firm conviction that the trial court committed a clear error of judgment. *Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1989).

The test here is whether the trial court's action was inconsistent with substantial justice. *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 553-554 (1984); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989) (this Court applies "proper deference" to district court's denial of new trial); Rule 10 of the Supreme Court Rules (writ of certiorari granted only for compelling reasons).

Applying the foregoing principles to the case at hand, the trial court, in its broad discretion, found that petitioner's plea of financial distress arguably opened the door to cross examination about his eligibility for RRA benefits, making inapplicable the case of *Eichel v. New York Central Railroad Co.*, 375 U.S. 253 (1963). As explained in *Gladden v. P. Henderson & Co.*, 385 F.2d 480, 483-484 (3rd Cir. 1967), *cert. denied*, 390 U.S. 1013 (1968):

> This is what distinguishes the present case from *Eichel v. New York Central Railroad Co.*, 375 U.S. 253, 84 S. Ct. 316 (1963), upon which plaintiff relies. In that case, brought

> under the Federal Employers' Liability Act, the plaintiff had not affirmatively testified in such a manner as to warrant any effort at contradiction by cross-examination. Instead, defendant there attempted to introduce prejudicial evidence of disability pension payments simply because it was logically relevant on the extent and duration of the plaintiff's disability. *The barriers which have been created because of its prejudicial effect do not extend to the affirmative volunteering by a plaintiff of testimony which breaks into this restricted area.* (Emphasis added.)

To the same effect is *Cowens v. Siemens-Elema AB*, 837 F.2d 817, 824-825 (8th Cir. 1988), and *Gates v. Shell Oil*, 812 F.2d 1509, 1513 (5th Cir. 1987). *See also Lange v. Missouri Pacific R. Co.*, 703 F.2d 322 (8th Cir. 1983), and *Sullivan v. Chesapeake and Ohio Railway Company*, Nos. 90-1136, 90-1412, 1991 WL 216872 (6th Cir. 1991) (unpublished), *cert. denied*, __ U.S. __, 112 S. Ct. 1948 (1991), both of which applied the *Gladden* exception to *Eichel* in FELA actions. Indeed, petitioner acknowledges that all of these cases involved claims of financial distress which were raised by the plaintiff in the first instance and therefore are the exception to *Eichel* (Petition at p. 15).

Petitioner's case law is inapplicable. He mistakenly relies on four cases where plaintiff did not open the door but where nevertheless the defendant introduced evidence of collateral benefits in order to prove malingering or to seek an offset. *Eichel, supra,* at p. 3; *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34, 36 (1963) (the court also instructed the jury about collateral benefits). *See also Sheehy v. Southern Pac. Transp. Co.*, 631 F.2d 649, 652 (9th Cir. 1980), and *Green v. Denver & Rio Grande Western R. Co.*, 59 F.3d 1029, 1031, 1034 (10th Cir. 1995), *cert.*

*denied*, __ U.S. __, 116 S. Ct. 565 (1995), where additionally no cautionary instructions were given. None of this however occurred in the case at hand.

In two other cases cited by petitioner, the trial judge instructed the jury that the plaintiff had received collateral benefits. *Simmons v. Hoegh Lines*, 784 F.2d 1234, 1236 (5th Cir. 1986); *Wilcox v. Clinchfield R. Co.*, 747 F.2d 1059, 1060, 1061 (6th Cir. 1984) (evidence of such benefits was allowed without plaintiff opening the door). That did not happen in this case either.

Petitioner cites *Savoie v. Otto Candies, Inc.*, 692 F.2d 363, 367, 370 (5th Cir. 1982), which holds that *plaintiff's* evidence of maintenance benefits was admissible over defendant's objection as some evidence of plaintiff's contested status as a *Jones Act* seaman. Again, the point in question has no bearing on petitioner's case here since his FELA status was never in issue.

Petitioner's reliance on *Riddle v. Exxon Transp. Co.*, 563 F.2d 1103, 1107, 1108 (1977), is entirely misplaced. There, defendant offered evidence of collateral benefits without plaintiff ever opening the door, but a cautionary instruction was given and a defense verdict was thereby upheld on appeal.

Petitioner refuses to accept the fact that federal appellate courts consistently have held that a trial court does not abuse its discretion when it allows evidence of collateral benefits after the plaintiff has opened the door. Thus, petitioner's suggested conflict amongst the circuit courts is imaginary, particularly when applied to the facts of this case where petitioner not only opened the door but also secured a curative instruction during respondent's cross examination.

Further, petitioner waived any arguable error when he opened the door again after receiving that curative instruction and, as the trial court and the court of appeals held, when he again failed to move for a mistrial.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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## APPENDIX A — STATUTE INVOLVED

### 45 U.S.C. § 231a. Annuity eligibility requirements

(a) Individuals eligible for annuities; disability standards; proof of continued disability

(1) The following-described individuals, if they shall have completed ten years of service and shall have filed application for annuities, shall, subject to the conditions set forth in subsections (e), (f), and (h) of this section, be entitled to annuities in the amounts provided under section 231b of this title.

* * *

(iv) individuals who have a current connection with the railroad industry, whose permanent physical or mental condition is such as to be disabling for work in their regular occupation, and who (A) have completed twenty years of service or (B) have attained the age of sixty.

* * *